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PACIFIC TELESIS
Group-Washington

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

August 9, 1994

William F. Caton
Acting Secretary
Federal Communications Commission
Mail Stop 1170
1919 M St., NW Room 222
Washington, DC 20554

Dear Mr. Caton:

Re: CC Docket No. 93-252

On behalf of Pacific Bell, please find enclosed an original and six copies of its *Comments* in the above-referenced proceeding.

Please stamp and return the provided copy to confirm your receipt. Please contact me should you have any questions or require additional information concerning this matter.

Sincerely,

Alan F. Ciamporcero / KD

Enclosures

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AUG - 9 1994

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of Implementation of Sections 3(n) and 332 of the Communications Act Regulatory Treatment of Mobile Services	CC Docket No. 93-252

COMMENTS OF PACIFIC BELL MOBILE SERVICES

I. INTRODUCTION

Pacific Bell Mobile Services hereby comments on the Second Further Notice of Proposed Rulemaking in the above-captioned proceeding. In this Second FNPRM the Commission seeks comment on whether certain non-equity relationships should be attributable interests for the purposes of applying the 40 MHz limitation on PCS spectrum, the PCS-cellular cross-ownership rules, or a more general Commercial Mobile Radio Service "CMRS" spectrum cap. The Commission specifically cites resale agreements, management contracts, and joint marketing agreements as relationships that may be considered as attributable interests.[1] None of these types of agreements poses a threat to competition in the market for CMRS, and they should not be treated as attributable interests.

II. RESALE AGREEMENTS

The Commission's tentative conclusion is that resale agreements should not be considered attributable interests because resellers cannot exercise effective control over the spectrum they use. Nor do resellers have the ability to reduce the amount of service provided over the spectrum because other resellers could enter into additional resale arrangements.[2] We agree.

Reselling increases competition in the marketplace. It does not lessen it. In California there is an active market in the resale of cellular services. For example, there are 4 resellers with more than 20,000 customers each, approximately

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[1] In the Matter of Implementation of Sections 3(n) and 332 of the Communications Act Regulatory Treatment of Mobile Services, GN Docket No. 93-352, Second Further Notice of Proposed Rulemaking released July 20, 1994, para. 5 (Second FNPRM)

[2] Id. at para. 12.

5-7 resellers with 4,000-10,000 customers and over 20 resellers with 1,000-3000 subscribers.

The fact that a cellular reseller may acquire spectrum for PCS service will not have a negative effect on competition. As the Commission knows, the reseller has no control over the cellular spectrum. Moreover, as there are no restrictions on resale, the market is open to new entrants. In contrast, treating resale as an attributable interest may lessen competition. Parties interested in both cellular resale and direct provision of PCS services may decline to participate in the resale business if participation would limit their flexibility in pursuing PCS licenses. The result would be fewer resellers in competition with each other and the facilities-based cellular providers.

In short, resale of CMRS poses no threat to competition and should not be treated as an attributable interest for the purpose of applying any spectrum caps.

III. MANAGEMENT AGREEMENTS

The Commission does not specifically define management agreements but is concerned that the managing entity may have access to information such as business plans, customer lists, product and service development and marketing strategies that would enable the managing entity to impede competition in the same geographic area.[3] While we appreciate the Commission's concern, we do not believe management contracts that do not rise to a de facto level of control pose any threat to competition. One, the entity providing the management assistance has no control over the license and operates solely at the discretion of the licensee. Two, management contracts are limited in duration and may or may not have any relationship to the term of the license. Consequently, the ability to impede competition is limited by the very nature of the relationship between the licensee and the management entity.

Moreover, PCS licenses are going to require a very significant investment. The licensee has every incentive to carefully scrutinize any management agreement in to which it enters to ensure that the agreement will put it in the best competitive position possible. Thus, it is unlikely that even if a managing entity wanted to impede competition that it would be able to do so. Also, the managing entity presumably wants to retain the contract so it has a strong incentive to use any

[3] Id. at para. 6.

information it receives in a way that is positive to the licensee.

On the other hand, if management agreements are treated as attributable interests, competition will suffer. The likely providers of management assistance will be the licensees that are experienced operators of commercial mobile radio services. They have expertise that will be beneficial to less experienced licensees. It is that expertise that will help to make a less experienced licensee a stronger competitor. However, if a management contract is treated as an attributable interest, experienced CMRS providers who also have their own PCS licenses will be discouraged from providing that expertise to other licensees, such as designated entities, because it will limit their ability to also hold licenses. In effect, the rule would mean that those most able to assist the less experienced licensees would be discouraged from doing so.

The Commission also requests comment on how management contracts should be structured to ensure that they do not have an adverse effects on competition and whether it would be an unreasonable expenditure of Commission resources to examine management contracts.[4]

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[4] Id. at paras. 8, 10.

The Commission should not involve itself in such micromanagement of business. Defining what constitutes a management contract would be just the beginning of an administrative nightmare. For example, is a limited agreement to provide technical consulting a management agreement? A decision to treat some agreements as attributable and not others would be a hotbed for litigation. There would be an incentive for competitors to challenge management agreements in an attempt to take a competitor out of the market. For example, an entity owning 40 MHz of spectrum and providing management assistance to other licensees would no doubt find its management agreements under attack.

This situation benefits no one. The management entity would have to spend time and money to defend its contract and might decline to provide management assistance for that very reason. The Commission would have to expand its resources resolving claims in this area. Licensees seeking management assistance would find their choices limited because of the threat of litigation.

The market for CMRS is competitive. Every geographic area will be served by two facilities-based cellular providers, cellular resellers, a minimum of 3 PCS providers, and Specialized Mobile Radio Service providers. In previous orders in this docket the Commission has recognized that stringent regulation of CMRS is not necessary.[5] There is no basis to depart from that conclusion here and create a complex set of rules surrounding management contracts, when there is no evidence that management agreements will lessen competition.

IV. JOINT MARKETING AGREEMENTS

The Commission defines joint marketing agreements to be when two or more CMRS providers pool their resources to market their services to consumers.[6] The Commission notes: "We believe that such joint ventures may be beneficial to both licensees and consumers because of the savings that could be realized by pooling resources for advertising and direct sales. These savings could then be passed on to the consumer."[7] The Commission goes on to say that they are concerned that "such agreements may provide competitors access to information, or have

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[5] In the Matter of Implementation of Sections 3(n) and 332 of the Communications Act Regulatory Treatment of Mobile Services GN Docket No. 93-252. Second Report and Order 9 FCC Rcd 1441, paras. 174, 180-182 (1994) (declining to tariff CMRS rates because of sufficient competition, forbearance from applying Sections 203, 204, 205, 211, 212 and 214 of the Communications Act to CMRS providers).

[6] Second FNPRM, para. 14.

[7] Id.

other anticompetitive effects that could impede vigorous competition."[8]

We agree with the Commission that cost savings associated with joint marketing are of benefit to consumers. Again, given the competitive nature of CMRS, competition should not be impaired by joint marketing agreements. There is capacity on wireless systems and numerous competitors which creates a constant need to retain customers and add new ones. A joint marketing agreement by some CMRS providers may result in a joint marketing agreement by other providers attempting to meet the competition and pass similar savings along to consumers. Consumers will benefit and competition will be enhanced. In addition, state and federal antitrust law provide protection against anti-competitive actions taken under the guise of joint marketing.

IV. DESIGNATED ENTITIES

The Commission requested comment on whether with respect to resale, joint marketing and management agreements, different rules should be applied to designated entities.[9] Because our

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8 Id. at para. 16.

9 Id. at para. 11.

position is that none of these non-equity relationships should be attributable, there is no need for special rules relating to designated entities.

V. CONCLUSION

In conclusion, the Commission has already established criteria to determine if there is a *de facto* transfer of control. If it finds a *de facto* transfer of control, then that interest is clearly attributable. Absent a *de facto* transfer of control, the

Commission should not treat resale, management agreement, or joint marketing agreements as attributable interests.

Respectfully submitted,

PACIFIC BELL MOBILE SERVICES

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